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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1230

NEWTON OIL COMPANY

Appellant,

vs.

JOHN BOCKHOLD AND EARLE F. WINGREN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

IVOR O. WINGREN,
HENRY E. LUTZ,
WILLIAM H. SCOFIELD,
Counsel for Appellees.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

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No. 1230

NEWTON OIL COMPANY, A CORPORATION,
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JOHN BOCKHOLD AND EARLE F. WINGREN,
Appellees.

MOTION TO DISMISS FOR WANT OF JURISDICTION

Come now the appellees above named, by their counsel, and respectfully move the dismissal of the appeal herein upon the grounds following:

PART I

1. That it appears from appellant's so-called Jurisdictional Statement that none of the matters and things or questions specified in Section 344, Title 28, U. S. C. A., exist or are present in this cause.

2. That appellant has in no manner complied with Rule 12 of the Rules of this Honorable Court by setting forth any of the matters therein specified so as to bring this

cause within the jurisdictional provisions of said Section 344, Title 28.

3. That this Honorable Court is without jurisdiction of this cause in that, as is manifest from the record, no federal or constitutional question is present nor was such involved or decided in the determination below, either directly or indirectly.

4. Appellant's pretended defenses of estoppel and laches, of which it is alleged to have been deprived, are wholly inoperative, ineffective and void as against the ruling of the Court below that the alleged contract (Exhibit B) upon which appellant relies, and which was and is the basis and measure of its alleged rights, was void on its face *ab initio* as a matter of law.

5. The ruling of the Court below rests exclusively upon state law adequate to support it.

PART II

1. That appellant perfected its first appeal to this Court on, to-wit, July 10, 1946, from the judgment of the Supreme Court of Colorado of June 3, 1946, and thereafter deliberately abandoned said appeal while still pending by filing with said Colorado Supreme Court a second petition for rehearing which was granted, and said Colorado Supreme Court thereupon proceeded to reconsider the cause anew, and said Court on, to-wit, December 4, 1946, again entered the same judgment as that by it entered as of June 3, 1946.

2. That the appellant herein as well appears from the record, forfeited and abandoned all appellate rights in this cause.

3. That the appeal herein is not within the time prescribed therefor.

4. That the Supreme Court of Colorado erroneously reopened this cause after granting said first appeal, while said appeal was still pending in this Court.

IVOR O. WINGREN,
HENRY E. LUTZ,
WILLIAM H. SCOFIELD,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

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No. 1230

NEWTON OIL COMPANY, A CORPORATION,
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vs.

JOHN BOCKHOLD AND EARLE F. WINGREN,
Appellees.

STATEMENT BY APPELLEES IN OPPOSITION TO APPELLANT'S JURISDICTIONAL STATEMENT AND IN SUPPORT OF MOTION TO DISMISS.

As will hereinafter be more particularly pointed out, this is the second appeal in this cause. We shall, however, undertake, with what brevity we may, to demonstrate that there was not drawn in question the validity of a treaty or statute of the United States and the decision was against its validity, nor was there drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of its validity, or other questions involved in this case meeting the statutory requirements for appeal to this Court, nor any such Constitutional question as to authorize the attempted appeal to be treated as a petition for certiorari.

We shall pass without comment Paragraphs 1 and 2 of the motion.

Paragraph 3 of Part I of Motion to Dismiss—No Federal Question. State Grounds Are Exclusively Present

The case below was as follows:

On August 5, 1942, by an agreement, appellee Bockhold transferred certain specified oil interests to appellant (Exhibit A attached to the complaint). This agreement is not involved in suit, and called for no determination.

On August 10, 1942, a second agreement (Exhibit B attached to the complaint) was entered into by the parties purporting to call for appellee's services "to effectively and successfully carry out the terms" of Exhibit A.

Respecting this Exhibit B, the Court below in its first opinion (page —, R. —) said:

> "The interpretation of this contract is the one substantial issue of the case, plaintiff (appellee) contending that the Court erred in holding it a valid contract and the defendant (appellant) asserting that it constitutes a valid and unambiguous contract of employment requiring no interpretation. Looking to the terms of the 'contract' itself plaintiff's (appellee's) obligations thereunder appear to fall into four groups."

And in the second opinion the issues are stated thus:

> "The issue tendered by the complaint and answer thereto was the validity of Exhibit B; that presented by the counterclaim and answer thereto was whether the lease was taken in violation of Exhibit B. Therein, also, the defendant had to stand on the validity of Exhibit B and could not succeed if it was invalid."

The Court then proceeds to analyze the instrument almost provision by provision, and concludes that it is ambiguous; that it could so operate as to afford appellee neither compensation nor consideration of any sort, regard-

less of what service he might render or what further property he might cause to come to appellant's possession; in short, that it was unconscionable and unfair, and finally determined that such were the numerous and profound uncertainties of the instrument "that if the minds of the parties ever met as to services and obligations to be rendered by plaintiff (appellee) to defendant (appellant) such services and obligations cannot be ascertained from the instrument itself."

After citing authorities, the Supreme Court reversed the ruling of the District Court that the contract was valid, and ordered the lower court to enter judgment in favor of appellees on the ground of the contract's invalidity.

The case of *Saunders* v. *Shaw*, 244 U. S. 317, on which appellant relies, is clearly not applicable. In that case it was merely held that a proper disposition thereof might turn on facts the defendant had no opportunity to offer. The instant case turned not on facts of any evidentiary character, or any capable of being offered, but upon the instrument itself as a matter of law.

Paragraph 4 of Part I of Motion to Dismiss—Defense of Estoppel

The Supreme Court in its opinion made no reference to defendant's (appellant's) fourth defense, which is the basis here for its alleged constitutional claim raised for the first time in its petition for rehearing. That defense purported to set up:

1. That the plaintiff (appellee) well knew that defendant was relying upon the employment agreement, Exhibit B.

2. That, so relying, the defendant expended moneys developing the properties described in Exhibit A and not involved in suit.

3. In further reliance on Exhibit B, defendant refrained from acquiring certain properties adjacent to those described in Exhibit A, and which were necessary to the proper development of Exhibit A properties.

4. Because of plaintiff's delay in questioning the binding force of Exhibit B he has been guilty of laches.

The above defenses were doubtless not noticed because patently irrelevant and self-dissipating. In view of what we are to say in discussing the "Appeal", *infra*, we refrain from noting either the merits or demerits of this pretended defense, but concerning Exhibit B the trial court held (fol. 424):

> "The actions of men generally determine the interpretation that is to be placed on a contract, and in the opinion of the Court, and what apparently has been overlooked by both parties, is that this is not a contract of employment but a contract to employ, and the court so rules and interprets the contract. That has been demonstrated by the actions of the defendant company, that they considered this a contract to employ, and it never ripened into one of employment, and nothing has been done by either side to ripen it into a contract of employment."

Thus both the lower courts are at least in partial agreement, the trial court that it never became operative because nothing was ever done under it by the parties, and the Supreme Court that it never became operative because it was void in the making. In that posture of the case any claim of estoppel or laches fades into nothingness.

Estoppel does not lie as against invalid contracts.

See *U. S.* v. *Golden* (10 C. C. A.), 34 F. (2d) 367-373:

> "Is there estoppel by contract? It is quite true that, where one has contracted in light of certain facts,

ordinarily he is estopped to deny their existence. But it must be a valid contract; the estoppel lasts only as long as the contract; if the contract is set aside for fraud, mutual mistake, illegality, lack of consideration, or other reasons, the estoppel goes with the contract. Corpus Juris states the rule:

'If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident or mistake. There can, of course, be no estoppel as to matters not included in the contract.

'An estoppel by simple contract cannot be predicated on an invalid contract, unless it has been fully executed. However, it has been held that a part to an invalid contract, which is not illegal and unlawful may be equitably estopped to dispute the validity of the contract. An estoppel cannot be based on a contract which has been abrogated.' 21 C. J. 1111."

The validity of a contract is a matter of state jurisprudence

Colorado has so held. See *Des Moines Life Association* v. *Owen*, 10 Colorado Court of Appeals 131-134:

"• • •. Questions relating to the construction of contracts, and their validity and effect, are controlled and determined by the law of the place where they are made; but questions affecting remedies upon them, are governed by the law of the place where the suit is brought. What the pleadings shall be, what evidence is admissible under them, and the effect to be given to it, are matters pertaining solely to the remedy."

The United States Circuit Court of Appeals for the Tenth Circuit has likewise so stated the law in *Gossard* v. *Gossard*, 149 F. 2d 111-112:

"The law of the place where a contract is made governs its nature, validity, and interpretation, unless it appears that the parties, when entering into the con-

tract, intended to be bound by the law of some other place."

A federal question must have been presented for decision to the state court, and the decision of such question must have been necessary to the determination of the cause.

This Court has repeatedly so held, and we refer to Southwestern Bell Telephone Company v. Oklahoma, 303 U. S. 206-212 for one of the most recent pronouncements:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *DeSaussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Lynch* v. *New York*, 293 U. S. 52, 54."

The Appeal

From the foregoing it must incontestably appear that the grounds appellant assigns for appeal in this case are wholly untenable. The petition for appeal shows that the so-called constitutional question said to arise out of the estoppel defense was raised for the first time on petition for a rehearing in the court below, and it is asserted that appellant has no prior opportunity to raise the question because it could not have anticipated the ruling of the Supreme Court.

Such we submit is hardly the case, whether "anticipated" or not there is not now nor has there ever been any federal

question in this cause. The complaint alleged that Exhibit B was void for want of consideration, for want of mutuality and impossibility of performance, and in consequence of which was void *ab initio*. These were exactly the grounds upon which the court declared the contract invalid. Such having been the allegations of the complaint, it does not behoove appellant to contend that it could not have anticipated that the Supreme Court might so hold. Appellant knew that the trial court had held that Exhibit B had never ripened into a contract, and could well have anticipated that such holding might be affirmed, with result the case would have been terminated, and that only possible future controversy upon circumstances newly to arise would remain, but the lease in question would nevertheless continued to have remained the property of appellees. If one in litigation fails to anticipate affirmance, reversal, or a modification within the confines of the issues, with their attendant consequences, such cannot be attributable to his adversary, or to his adversary's disadvantage.

Had the Supreme Court affirmed the trial court, which assuredly appellant could have anticipated, it would have found itself in the identical position that it finds itself upon reversal, for, as noted, only the possibility of future not past controversies regarding Exhibit B would remain. In any and all events, the property herein involved would stand vested in the appellees.

Appellant misconceives its case. It would have lost exactly as much by affirmance as by reversal, so far as the present case is concerned or the property to which it relates. Such is the dilemma from which appellant seeks to extricate itself upon the purely imaginary and wholly non-existing ground of constitutional right to present the defenses of estoppel and laches, which faded from the case, as a matter of law, on the trial court's ruling that Exhibit B had never ripened into a contract. If there was no con-

tract, there was nothing upon which estoppel or laches could operate. It became doubly extinct when the Supreme Court ruled Exhibit B void as a matter of law.

The Supreme Court of Colorado never passed upon any constitutional or federal question in this cause, and never had an opportunity so to do, for the incontrovertible reason that such question never existed nor can exist.

A Contract Void Ab Initio Cannot Serve as a Foundation upon Which to Predicate Federal Rights

Conclusion of Part I of Motion to Dismiss

In summary, it is respectfully submitted:

1. This cause is destitute of either federal or constitutional question.

2. The pretended defenses of estoppel and laches are wholly ineffectual to raise any justiciable issue, for there has never been any hypothesis in this case against which they could be asserted, either in the trial court or in the Supreme Court of the State. Even in the event of a new trial, evidence of such defenses would be inadmissible.

3. The judgment below rests exclusively on state grounds, wholly unaffected by any federal questions.

4. The appeal is devoid of substance and presents nothing for the consideration of this Honorable Court, other than to order its dismissal and deny certiorari if that alternate writ be suggested.

Part II of Motion to Dismiss

Although we do not accentuate the point, we are constrained nevertheless to call the Court's attention to the fact that this is the second attempted appeal in this cause

and represents, we submit, an extraordinary misuse of appellate processes.

The record herein discloses the following:

The first appeal to this Court was prayed and allowed by the then Chief Justice of the Colorado Supreme Court on the 9th day of July, 1946, cost bond in the sum of $500.00 approved, remittitur recalled, and a period of sixty days fixed with which to file the transcript in this Court. These appellees were duly served with the order of the Colorado Court embodying the foregoing proceedings and which order served the function of a citation. In short, the appeal was in all respects perfected from the judgment of the Supreme Court of Colorado dated June 3, 1946.

The appellees thereupon and on July 23, 1946, in compliance with Rule 12, Par. 3, of the Rules of this Court, filed a motion to dismiss the appeal on the ground that there was no federal question either present or decided in the cause and that hence this Honorable Court was without jurisdiction. To that motion appellant, in conformity to Rule 7, Par. 3 of this Court, served these appellees on or about the 8th day of August, 1946, with a printed copy of a brief in opposition to the motion to dismiss, said brief entitling the cause in this Court as *Newton Oil Company, a corporation, Appellant,* v. *John Bockhold and Earle F. Wingren, Appellees.*

Thereafter and on the 6th day of September, 1946, at appellant's instance, the Chief Justice of the Colorado Supreme Court extended the return day fixed in the order allowing the appeal from September 10, 1946, to October 7, 1946, to the end that the record might be prepared and forwarded for the use of this Court.

Within the last mentioned interim however, and on the 22nd day of August, 1946, appellant without dismissing its said appeal, or taking any other steps with reference thereto, asked leave to file a second petition for rehearing

in the Supreme Court of Colorado, and that Court, notwithstanding the fact that appellees called to its attention that having yielded jurisdiction to this Court, it had divested itself of the right to reopen the cause, nevertheless on September 27, 1946 granted a second rehearing and proceeded to a reconsideration of said cause, and on December 4, 1946, handed down its second opinion reaching the identical conclusion announced as of June 3, 1946.

The judgment of June 3, 1946, was not vacated by the rehearing. The judgment of December 4, 1946, simply constituted a reaffirmation.

> "The common-law rule that an order granting a rehearing operates to reverse or vacate or set aside the original decision has often been modified to the extent of holding that the original opinion is merely suspended by such an order.
>
> "At common law an order granting a rehearing operates to reverse or vacate and set aside the original decision of the appellate court. This rule, however, has often been rejected or modified by cases holding that, unless the order granting the rehearing itself indicates otherwise, it does not operate to set aside the former judgment, or vacate the entry thereof, and the same stands until set aside, reversed, or modified, by subsequent order or judgment upon the rehearing; that the original judgment is merely suspended by the order of rehearing; or that the judgment as to which only a restricted rehearing is granted continues to stand and to be decisive of the issues not embraced in the order of rehearing." 4 *C. J. S.* Appeal and Error, Sec. 1446.

In this state of the record, one of three consequences is inevitable, all adverse to appellant, to-wit:

(a) Appellant forfeited all appellate rights by deliberately abandoning the first appeal.

> "When a party perfects an appeal and then abandons it, his right of appeal is exhausted; the power

over the subject is functus officio, and cannot be exercised the second time." *Hill* v. *Lewis*, 87 Oregon 239, 170 Pac. 316.

Doctrine reiterated *State* v. *Rosser*, 86 P. 2d 441.

See also *4 Corpus Juris Secundum*, Page 2008, Section 1388:

"Generally an act inconsistent with the prosecution of an appeal may constitute an abandonment thereof."

(b) This second appeal is too late since the judgment of the Supreme Court of Colorado of June 3, 1946 was not disturbed.

See *Corpus Juris Secundum*, Section 1446 *supra*.
Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131 at 137.

(c) The Supreme Court of Colorado was in error in reopening the cause after having divested itself of jurisdiction by granting the first appeal.

The Midland Terminal Ry. Co. v. *Warinner*, 294 Fed. 185 (8 C. C. A.).
Goddard v. *Ordway*, 101 U. S. 745-752.
Newton v. *Consolidated Gas Co.*, 258 U. S. 165-177.

Conduct so unusual on the part of an appellant as that represented in this case is rarely encountered in the authorities, hence their paucity. However the principle is obvious. The appellant having suffered the same judgment a second time at the hands of the Colorado Supreme Court, has estopped itself from now seeking the identical relief sought in its first appeal from an identical judgment first entered by the Colorado Supreme Court June 3, 1946. Successive appeals, followed by successive petitions for rehearing, followed by either alternate or identical judgments, can operate to render a cause almost endless, and in many instances destroy the value of the thing in controversy. The

instant case is an example. It represents an oil lease adjudged by the Colorado Supreme Court to be the property of the appellees. Like all oil leases exploration is required or forfeiture ensues. This case has now been in the Colorado Courts since June 25, 1943, or approximately four years.

The appellate processes of court are not designed to be toyed with so as to destroy property rights in the hands of those adjudged to be the owners, whether by delays beyond the time provided for taking appeals, or by abandoning appeals and then suing out subsequent appeals or otherwise. Had the first appeal herein been pursued instead of having been cast aside in favor of another tilt with the Colorado Supreme Court, the matters herein in dispute would long hitherto have found repose. It is submitted that this alleged second appeal from the same judgment re-affirmed by the second opinion, is an abuse of appellate privilege—indeed, the privilege no longer exists. It has been destroyed if the doctrine of the *Oregon* case *supra* be accepted. And certainly a lower court may not after appeal, by opening a former judgment, extend appellate rights nor the time for exercising them, nor afford the basis for successive appeals, nor yet may appeals be employed as instruments of coercion upon lower courts to grant rehearings. Manifestly, when the appellant in this cause abandoned its first appeal in favor of a rehearing by the Colorado Supreme Court, it took the hazard of getting the same result a second time, and this hazard it chose rather than appellate review by this Court, hence waived the right to that review. Certainly one may not make a mockery of the right of appeal by using it as a gambling device whereby to achieve more favorable results in the Court below. For such is to gamble wholly at the expense of one's adversary and to extend the litigating process far beyond that per-

mitted by law. The judgment of the Supreme Court of Colorado on June 3, 1946, not having been set aside, this appeal is many months too late. And if that were not enough, the other matters hereinabove mentioned conclusively establish that appellant has precluded itself for all time from seeking review by this Court. Appellate rights, we take it, must rest upon a foundation more secure than that afforded by a contemptuous disregard of those rights after having first invoked them.

And to repeat a contract void *ab initio* both as a matter of general jurisprudence and state law is a faulty medium through which to seek the interposition of this Court, whether by one appeal or many.

It is respectfully submitted the appeal must be dismissed.

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